In The

United States Court of Appeals

For the Ninth Circuit

No. 18,252

The Superior Oil Company,

Petitioner,

v.

Federal Power Commission,

Respondent.

On Petition to Review Order
of the
Federal Power Commission

BRIEF OF PETITIONER THE SUPERIOR OIL COMPANY

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JURISDICTIONAL STATEMENT

This Petition for Review is filed pursuant to Section 9(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. Sec. 717r, and Section 10 of the Administrative Procedure Act of 1946, 60 Stat., 243, 5 U.S.C. Sec. 1009, and is to review the action of the Federal Power Commission[1] in summarily rejecting without hearing the filing

[1] For purposes of brevity, the following names will be used in this Brief:
"Act"— Natural Gas Act, 15 U.S.C. 717-717w,
"Commission"— Federal Power Commission,
"El Paso"— El Paso Natural Gas Company, and
"Superior"— The Superior Oil Company.

by Superior of Superior's Supplement No. 8 to its Gas Rate Schedule No. 77 and its Amendment to Application for Certificate of Public Convenience and Necessity, both dated May 25, 1962. This rejection was by Letter-Order of the Commission's Secretary dated June 15, 1962 (R-120). The Petitioner filed its Application for Rehearing before the Commission under Section 19(a) of the Act on July 9, 1962 (R-123) but such Application was ignored by the Commission and denied by operation of law as of August 8, 1962 (Section 19(b) of the Act). Petition for Review was filed herein on October 5, 1962, within sixty days from the date of such rejection by operation of law, asserting jurisdiction in this Court by virtue of the fact that Superior is incorporated under the laws of the State of California and has an office in Los Angeles, California. The statutory provisions primarily involved are Sections 4, 5, 7 and 16 of the Natural Gas Act (15 U.S.C. Sections 717c, 717d, 717f, and 717o) which are reproduced in the Appendix to this Brief.[2]

STATEMENT OF THE CASE

Under Section 4 of the Act all rates, charges, classifications, rules, regulations and contracts relating to a sale of natural gas constitute the "rate schedule" for that sale and must be filed with the Commission. No change in any rate schedule shall become effective without notice to the Commission by the filing of such "change in rate schedule" thirty days prior to the effective date.

Under review here is the Letter-Order issued by the Commission's Secretary summarily rejecting the filing by Superior of a supplement to a contract as (1) a Notice

[2] Section 4 of the Act, (15 U.S.C. 717c) is printed in the Appendix, page 1a
Section 5 of the Act (15 U.S.C. 717d) is printed in the Appendix, page 3a
Section 7 of the Act (15 U.S.C. 717f) is printed in the Appendix, page 4a
Section 16 of the Act (15 U.S.C. 717o) is printed in the Appendix, page 8a
Section 19 of the Act (15 U.S.C. 717r) is printed in the Appendix, page 9a

of Change of Rate Schedule and (2) an Application for an Amendment to the Certificate of Public Convenience and Necessity. This supplemental contract only increased the acreage in the same field and over the same reservoir from which gas is being sold under the terms of the original gas sales contract. The original contract had previously been accepted by the Commission as Superior's Rate Schedule No. 77 and a certificate issued for the sale thereunder. The supplemental contract was similar in form and substance to two previous supplements to the same contract (each of which added acreage) and a third previous supplement which deleted acreage which had been lost by litigation. Each of these three supplements to the rate schedule and supplemental requests for Certificate had been accepted by the Commission. The order of rejection was issued without a hearing. The opportunity for a hearing and to introduce evidence was denied by the Commission when it ignored Superior's Application for Rehearing and Reconsideration.

The fact situation outlined above is set out in detail below.

Under date of June 11, 1958, Superior entered into a Casinghead Gas Contract with El Paso covering the sale of casinghead gas produced from approximately 8720 acres in the Aneth Field of southeast Utah (R-11). On June 5, 1958 and July 7, 1958, Superior filed such contract with the Commission as its Rate Schedule No. 77 and also filed an Application for a Certificate of Public Convenience and Necessity to which a copy of such contract was attached, which Application was designated as Docket No. G-15431 (R-1 and R-11).

By letter addressed to the Commission dated November 2, 1958, Superior applied for a temporary authorization

to deliver the subject gas, which Application was based on the emergency resulting from an Order from the Secretary of the Interior on November 11, 1958 prohibiting further flaring of gas from such Field, which cessation of flaring by Superior would of necessity have required the shutting in of the oil wells and would have jeopardized Superior's leases (R-48). The temporary authorization was granted by a Letter-Order of the Commission's Secretary dated November 18, 1958 (R-52).

On February 17, 1960, Superior filed its Second Supplement to its Application for a Certificate in Docket No. G-15431 and its Supplement No. 4 to Rate Schedule No. 77 to which was attached a Supplemental Casinghead Gas Contract dated December 30, 1959, between Superior and El Paso by the terms of which the original casinghead gas contract was supplemented and amended by the addition of approximately 800 acres of land to the land described in such original contract (R-54, and 64 and 67). By Letter-Order dated May 19, 1960, the Commission's Secretary granted temporary authority to sell gas from such additional acreage (R-71), which Letter-Order was modified by a subsequent Letter-Order dated June 29, 1960 (R-73).

The Commission granted a Certificate of Public Convenience and Necessity for the sale by its Opinion No. 335, which was issued on February 23, 1960, and the Order thereon, 23 FPC 370, which Certificate became final when such Order was affirmed by the Fifth Circuit on April 15, 1960 in *Texaco, Inc.* v. *FPC,* 290 F. 2d 149 (5th Cir., 1961).

On June 7, 1960 Superior and El Paso entered into a Second Supplemental Casinghead Gas Contract under the terms of which Exhibit A of the original contract was amended and supplemented by the addition of approximately 2560 acres of land to that previously covered (R-78)

On July 20, 1960 Superior filed such supplemental contract of June 7, 1960 as part of its Supplement No. 5 to Rate Schedule No. 77 (R-75) and its Third Supplement to the Application for Certificate (R-82). Under date of September 21, 1960 the Commission's Secretary issued a Letter-Order granting temporary authority to sell the gas from such additional acreage and accepted Superior's Supplement No. 5 to Rate Schedule No. 77 for filing (R-87).

Again, under date of January 1, 1961, El Paso and Superior entered into a Supplemental Casinghead Gas Contract by the terms of which approximately 1040 acres (as to which title had been lost by litigation) were deleted from the lands covered by the original contract (R-93). Superior filed such supplemental contract as part of its Supplement No. 6 to Rate Schedule No. 77 (R-90) and its Fourth Supplement to Application for Certificate (R-95) under date of February 3, 1961. By Letter-Order dated May 2, 1961 the Commission accepted such Supplement No. 6 for filing effective February 6, 1961 (R-99).

On September 18, 1961, Superior filed its Supplement No. 7 to Rate Schedule No. 77 reducing the initial price of the gas in accordance with Order No. 335 from 20¢ per Mcf (the original contract price) to 17.7¢ per Mcf (the price fixed by the Order) (R-100). This Supplement No. was accepted for filing by letter of the Commission's Secretary dated September 22, 1961 (R-103).

Under date of April 9, 1962, Superior and El Paso entered into another Supplemental Casinghead Gas Contract by the terms of which Exhibit A of the original contract was further amended and supplemented by adding to the lands therein described an additional 2640 acres of land in the same field and over the same reservoir (R-107). This supplement to the contract was similar in both form and substance to those previously filed (R-67, 78 and 93).

It was filed with the Commission as part of Superior's Supplement No. 8 to Rate Schedule No. 77 under date of May 5, 1962 (R-104), and incorporated by reference in the Amendment for Application for Certificate filed with the Commission on the same day (R-104). Both of these filings were summarily rejected by the Commission's Secretary by Letter-Order dated June 15, 1962 (R-120). The only reason stated by the Letter-Order rejecting Superior's filings was that since the Supplement to the original Contract "incorporates by reference the terms" of such original contract (which had been previously certificated by the Commission), "The supplemental agreement *appears,* therefore, to incorporate by reference pricing provisions other than those permitted by Section 154.93 of the Commission's Regulations. Therefore, in accordance with Commission Order No. 242 * * * the proposed rate schedule supplement and related petition to amend are hereby rejected." (R-120). (Emphasis added). Order No. 242 (27 F.R. 1356, Appendix p. 13a) had been issued by the Commission as a "rule" without a hearing on February 8, 1962 (R-121-122). Although Superior requested a hearing on these filings and Order No. 242 by its Application for Rehearing which was filed July 9, 1962 (R-123) this request was ignored by the Commission and thus rejected by operation of law (Sec. 19(a)) as of August 8, 1962. The Petition for Review herein was filed October 5, 1962, within sixty days from the date of such rejection by operation of law.

Superior has never had a hearing nor an opportunity to introduce evidence on this matter. Its filings were rejected because they "appeared" to incorporate provisions prescribed by Order No. 242. Had Superior been granted a hearing it would have shown that the economic principles which control the gas producing industry and which control Superior's present and future operations, and the

economic requirements of Superior, present and future, n general and in the Aneth Field, justify the "indefinite" price provisions in Superior's Aneth gas sales contract nd that such provisions are fair, just and reasonable. Order No. 242 was adopted by the Commission without a earing, and the filings of the Supplemental Rate Schedule nd the Application for Amendment to Certificate were ummarily rejected without a hearing, which was again enied in rejecting Superior's Application for Rehearing. Superior has not had its day in court.

STATEMENT OF POINTS

The Commission by summary rejection of the certificate nd rate filings of Superior erred as follows:

1. THE COMMISSION'S ACTION EXCEEDS THE AUTHORITY DELEGATED TO IT UNDER THE NATURAL GAS ACT.
2. THE COMMISSION'S ACTION DETERMINES SUBSTANTIVE RIGHTS OF SUPERIOR WITHOUT HEARING OR EVIDENCE, WHICH IS VIOLATIVE OF SECTIONS 4 AND 7 OF THE NATURAL GAS ACT.
3. THE COMMISSION'S ACTION AMOUNTS TO A TAKING OF SUPERIOR'S PROPERTY WITHOUT DUE PROCESS OF LAW AND A TAKING OF ITS PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION WHICH IS CONTRARY TO THE FIFTH AMENDMENT.
4. THE COMMISSION'S ACTION IS CONTRARY TO THE REGULATORY SCHEME OF THE NATURAL GAS ACT AS WRITTEN BY CONGRESS AND AS INTERPRETED BY THE SUPREME COURT OF THE UNITED STATES.

5. THE COMMISSION'S ACTION WAS DISCRIMINATORY AS TO SUPERIOR.
6. THE COMMISSION'S ACTION WAS UNREASONABLE, ARBITRARY AND CAPRICIOUS.
7. THE COMMISSION'S ACTION HEREIN, INSOFAR AS IT WAS BASED ON SECTION 154.93 AND SECTION 154.100 OF ITS REGULATIONS, AND ITS ORDER NO. 242 PROMULGATING THE HEREIN MATERIAL PORTIONS OF SAID REGULATIONS, IS INVALID FOR THE REASON THAT SAID ORDER NO. 242 AND THE REGULATIONS BASED THEREON ARE UNLAWFUL FOR EACH OF THE ABOVE STATED REASONS "1" THROUGH "6". SAID ORDER PURPORTS TO DETERMINE SUBSTANTIVE RIGHTS OF SUPERIOR AND SIMILARLY SITUATED PRODUCERS, BUT WAS ENTERED WITHOUT AN OPPORTUNITY FOR HEARING.
8. COMMISSION ORDER NO. 242 HAS NEVER BEEN JUDICIALLY CONSIDERED. THIS SITUATION PRESENTS THE FIRST OPPORTUNITY OPEN TO SUPERIOR TO RAISE THE ISSUE OF THE UNLAWFULNESS OF ORDER NO. 242 BEFORE ANY REVIEWING COURT.

ARGUMENT

POINT 1 THE COMMISSION'S ACTION EXCEEDS THE AUTHORITY DELEGATED TO IT UNDER THE NATURAL GAS ACT.

POINT 2 THE COMMISSION'S ACTION DETERMINES SUBSTANTIVE RIGHTS OF SUPERIOR WITHOUT HEARING OR EVIDENCE, WHICH IS VIOLATIVE OF SECTIONS 4 AND 7 OF THE NATURAL GAS ACT.

The Commission erred in rejecting Superior's filings vithout a hearing. Superior filed a Change of Rate Schedule o which was attached the supplement to the contract add- ng additional adjacent acreage (R-104) and also filed a equest for an Amendment to its Certificate, which amend- nent would add the acreage to that already certificated R-111). Both filings were summarily rejected (R-120).

In *Mississippi River Fuel Corp.* v. *FPC,* (3 Cir. 1953) 202 '. 2d 899, petition for writ dismissed 345 U.S. 988, 73 S. Ct. 138, the Commission, as here, rejected a filing of a rate hange without a hearing. The Court said that the

> "principal ground of complaint (was) that the Commission was required to grant a hearing on its proposed tariff changes and had no authority to reject its filing summarily." (900)

The Commission's action was reversed and the matter emanded for a hearing. The Court said (901-902):

> "Motions to dismiss for failure to state a cause of action and motions for summary judgment are familiar judicial devices for avoiding the delay of a full scale hearing * * *. It may well be that a quasi-judicial body such as the Federal Power Commission has need for some analogous procedures to expedite the handling of those matters which come before it which can be resolved solely as matters of law or on the basis of some easily ascertained fact. But the statute which defines the powers of the Commission in natural gas matters makes no provision for any such procedures. * * * The Commission has simply refused to recognize as properly before it or retain for action as prescribed by the statute a filing which met all the formal requirements. On the face of Section 4 of the Natuarl Gas Act * * * the Commission had only two alternatives * * *. It did neither of these things. It purported to follow a third course, rejection without hearing — a course for which it cannot show even color of statutory authority."

The *Mississippi River* case clearly describes the situation here. Superior has made filings for both the certificate and rate dockets which filings met all of the *formal* requirements for such filings. The Commission rejected such filings without a hearing, solely upon the ground that the original contract (R-11) which the Commission had already accepted and approved by Order No. 335, 23 FPC 370, and which was supplemented by the supplemental contract, *"appears"* to contain provisions now objectionable to the Commission. No opportunity was afforded for a hearing on the "appearance" or upon the merits. In the words of the Third Circuit (903)

> ". . . it shows that the order * * * must be set aside as wholly beyond the authority of the Commission."

Again, in *Willmut Gas & Oil Company* v. *FPC*, (D.C. Cir. 1961) 294 F. 2d 245, cert. den. ..... U.S. ....., 82 S. Ct. 477, the distributor filed a petition urging that the Commission reject a rate change filed by United Gas Pipe Line Company and appealed from the Commission's refusal to reject such filing. In that case the action of the Commission was affirmed, the Court saying:

> "Under its rate-making and rate-changing power which we shall show is not affected by the Natural Gas Act, United could change at will the rates offered to customers, since it had established them ex parte and not by contract. Moreover, Section 4(d) of the Act does not give the Commission discretion to reject schedules of increased rates tendered by a natural gas company; on the contrary, Section 4(d) requires that new schedules be filed with the Commission when notice of a rate change is given. The Commission's power with respect to a filed increase is found in Section 4(e) to initiate a hearing as to the lawfulness of the change rates, to suspend their effectiveness for a time, and to order refunded that portion of the increase which, after hearing, it determines to be lawful. Thus the Act

> provides for investigation of changed rates which have been filed; but it does not contemplate that the Commission may refuse to file a tendered new schedule showing changes in rates, or that it may summarily reject or disallow the new schedule without a hearing." (248-249)

The Court concluded (250-251):

> "The Commission was not authorized to reject the filing in this case on any ground appearing on its face. Its only statutory authority was to enter upon a hearing concerning the lawfulness of such rates, to suspend their effectiveness for a time, and after full hearing to make such orders with reference thereto as would be proper in a proceeding under Section 5(a) of the Act."

Each of the foregoing cases followed the *Memphis* decision, *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division* (1958) 358 U.S. 103, 79 S. Ct. 194, and each held that where, as here, filings are made, the Commission *cannot reject them without a hearing.* The *Mississippi River* case reversed the Commission for such rejection; and the *Willmut* case affirmed the Commission's refusal to reject. In the instant case the Court ought forthwith remand the proceedings to the Commission for hearing.

Under the statutory scheme of regulation the Commission has adequate powers to protect the consumers by its control over any future price or other rate changes and by its reviewing and testing such changes under Section 4. *Atco, The Atlantic Refining Co.* v. *Public Service Commission* (1959) 360 U.S. 378, 79 S. Ct. 1246; and *Mobile, United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.* (1956) 350 U.S. 332, 76 S. Ct. 373.

In the Letter-Order here under attack, the Commission has exceeded its jurisdiction and reached a result which must be rejected as unauthorized by the applicable statute.

The Commission has ignored the right of the seller and buyer to contract and to change their contracts. *Mobile, supra,* pp. 338-339. It has ignored and violated those portions of Sections 4 and 7 of the Act which require a hearing before denying a certificate application or a change in rate schedule. "The first prerequisite to an order by the Commission is that it shall be preceded by a hearing and findings." *FPC* v. *Natural Gas Pipeline Company of America* (1942) 315 U.S. 575, 583-584, 62 S. Ct. 736. (This was the decision which upheld the constitutionality of the Act). Such action cannot be valid. An administrative agency must act within the power granted it by statute; and any act exceeding such power is void. *Social Security Board* v. *Nierotko* (1946) 327 U.S. 358, 369, 66 S. Ct. 637; *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express* (1956) 351 U.S. 49, 54, 76 S. Ct. 574; *United States* v. *Fort Belknap Irrigation District* (D. Mont. 1961) 197 F. Supp. 813, 822. At no place in the Act is there the slightest implication of a grant of power to prescribe the substantive provisions of contracts.

The Commission has violated the provisions of the Act and has sought to amend the Act by administrative action. This it cannot do. *H. L. Hunt* v. *FPC* (5 Cir. 1962) 306 F. 2d 334, 340 ff. The filings here involved are both a change of rate schedule filing under Section 4, and a filing for an amendment of the certificate under Section 7. By its very act of rejection, the Commission violated the Act. As the Court said in *Willmut, supra,* page 250:

> "* * * But the broad power granted by this statutory language does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to the requirement of section 4(d) of the Act that it notify the Commission of the changes, so that it may proceed

under Section 4(e) * * * Thus, it seems clear that such an order or regulation would amount to a legislative change which is beyond the authority of the Commission."

See also *Mississippi River Fuel Corp.* v. *FPC* (3 Cir. 1953) 202 F. 2d 899, 901 and 903.

Since the Commission cannot determine the initial price (*Catco, supra,* p. 392), it cannot overturn other prospective provisions which do not affect the initial price or classification. The power of the Commission is limited to that to suspend the effectiveness of changes in rate schedules and to hold hearings to determine whether such changes are violative of the Act or the standard of "just and reasonable." *Catco,* p. 392, rejected the idea that the Commission can modify contractual provisions under Section 7, and said that it could only impose reasonable conditions on price provisions to protect the consumers from excessive charges *during the pendency of Section 4 and Section 5 proceedings.* The Commission has here attempted to exceed that power and thus has violated the statute which created it.

POINT 3 THE COMMISSION'S ACTION AMOUNTS TO A TAKING OF SUPERIOR'S PROPERTY WITHOUT DUE PROCESS OF LAW AND A TAKING OF ITS PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION WHICH IS CONTRARY TO THE FIFTH AMENDMENT.

The statutory scheme of regulation as interpreted and confirmed by the courts in *Mobile, United Gas Pipe Line Company* v. *Mobile Gas Service Corp.* (1956) 350 U.S. 332, 338, 339 and 341, 76 S. Ct. 373, and *Memphis, United Gas Pipe Line Company* v. *Memphis Light, Gas and Water Divi-*

sion (1958) 358 U.S. 103, 110-113, 79 S. Ct. 194, is that it recognizes the right of the natural gas companies to make, change and file rates and rate provisions. These contract rights are subject only to the provisions of the Act requiring notice to the Commission and the power of the Commission to review such rates and changes in rates and filings. In denying to Superior the right to enter into and change its contracts, the Commission went further than violating the statutory scheme of regulation. It sought to prescribe the subject matter of such contracts and changes and the terms and provisions upon which Superior and its buyer could agree. By this effort, the Commission would control not merely the form of the contract, but the very substance thereof. The substantive right to contract is a property right. The denial of such substantive right is a taking of Superior's property without compensation and in violation of the Fifth Amendment. *Currin* v. *Wallace* (1939) 306 U.S. 1, 59 S. Ct. 379; *Secretary of Agriculture* v. *Central Roig Refining Co.* (1950) 338 U.S. 604, 70 S. Ct. 403; *L. B. Wilson, Inc.* v. *FCC* (D.C. Cir. 1948) 170 F. 2d 793.

Under the express provisions of Sections 4 and 5 of the Act the lawfulness of rates and rate changes and under the express provisions of Section 7 the public convenience and necessity are to be determined by the Commission only *after a hearing. FPC* v. *Natural Gas Pipeline Co. of America, supra,* pp. 583-584; and in addition, Congress wrote into the Act the standards to be applied by the Commission in determining the lawfulness of rates and rate changes and the public convenience and necessity. The denial of such hearing and the refusal to apply the statutory standard is a denial of the due process guaranteed by the Fifth Amendment. *NLRB* v. *Burns* (8 Cir. 1953) 207 F. 2d 434, 436; *Warren Petroleum Corp.* v. *FPC* (10 Cir. 1960) 282 F. 2d 312; *Northern Pacific R. Co.* v. *Department of Public Works* (1925) 268 U.S. 39, 45-46, 45 S. Ct. 412.

POINT 4 THE COMMISSION'S ACTION IS CONTRARY TO THE REGULATORY SCHEME OF THE NATURAL GAS ACT AS WRITTEN BY CONGRESS AND AS INTERPRETED BY THE SUPREME COURT OF THE UNITED STATES.

The regulatory processes as set up by the Act are described as a "single statutory scheme" by the Supreme Court in *Mobile (United Gas Pipe Line Company* v. *Mobile Gas Service Corp.)* (1956) 350 U.S. 332, 338 ff, 76 S. Ct. 373:

> "These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful." * * * (341)

The Court said:

The Act evinces no purpose to abrogate private contracts as such (338).

The Act expressly recognizes that the rates to particular customers may be set by individual contracts (338).

The Act recognizes the need for individualized contracts between natural gas companies and customers (339).

The Act permits the relations between parties to be established initially by contract (339).

Under the Act the public interest is served by filing these contracts with the Commission (339).

Section 4(d) of the Act indicates no more than that otherwise valid changes cannot be put into effect without notice to the Commission (339-340).

The Act merely defines the review powers of the Commission. It provides neither to grant nor define the initial rate setting powers of natural gas companies (340).

Section 4(d) of the Act does not provide for filing proposals. It provides for filing notice of changes which have been made by the natural gas companies (342).

Under the Act the changes are made effective not by order of the Commission but solely by action of the natural gas companies. Changes are completed by compliance with the notice provision (342).

The change in rate can be set aside only upon being found unlawful by the Commission (342).

The filing of a change in rate schedule under Section 4(d) does not institute a proceeding to review. Such proceeding can only be instituted by the Commission itself under Section 4(e) (342).

The Act simply defines and implements the powers of the Commission to review rates which have been initially set by the natural gas companies (343).

The Act presumes the capacity of natural gas companies to make rates and contracts and to change them from time to time but does not define either power (343).

Except as specifically limited by the Act, the rate making powers of natural gas companies are no different from those they would possess in the absence of the Act, which are to establish and change at will the rates offered to prospective customers or to fix by contract and change the agreed rate by mutual agreement (343).

> "* * * In short, the Act provides no 'precedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by

natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act." (343)

This statutory scheme was recognized with approval by he Supreme Court in *Memphis, United Gas Pipe Line Company* v. *Memphis Light, Gas and Water Division* (1958) 358 U.S. 103, 110-113, 79 S. Ct. 194. After reiterating its holding n *Mobile, supra,* the Court said (112):

> "The necessary corollary of this proposition is that changes which in fact are 'otherwise valid' in the light of the relationship between the parties can be put into effect under §4(d) by a seller through giving the required notice to the Commission."

hen the Court concludes (113-114):

> "It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake. Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sums necessary for the maintenance and expansion of their systems through equity and debt financing would become most difficult, if not impossible. This concern was surely a proper one for Congress to take into account in framing its regulatory scheme for the natural gas industry, cf. *Federal Power Commission vs. Hope* (citation omitted), and we think it did so not only by preserving the 'integrity' of private contractual arrangements for the supply of natural gas, 350 U.S., at 344

(subject of course to any overriding authority of the Commission), but also by providing in §4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate Commission review."

These holdings have been followed by various Courts of Appeal. *Willmut Gas & Oil Company* v. *FPC* (D.C. Cir. 1961) 294 F. 2d 245, 248, 250, writ den. 82 S. Ct. 477; *Pan American Petroleum Corporation* v. *Kansas-Nebraska Natural Gas Company* (8 Cir. 1962) 297 F. 2d 561, 569; *Amerada Petroleum Corporation* v. *FPC* (10 Cir. 1961) 293 F. 2d 572, 574; *Sun Oil Company* v. *FPC* (5 Cir. 1960) 281 F. 2d 275, 277; and *Cities Service Gas Company* v. *FPC* (10 Cir. 1958) 255 F. 2d 860, 864, cert. denied 358 U.S. 837, 79 S. Ct. 61.

The order rejecting the filings violated this statutory scheme as set up by the Natural Gas Act and interpreted by the Courts. The completeness of this statutory scheme of regulation negatives any implication of power to reject contract provisions in advance. This Order also denied the right to Superior to make its contracts and change its rates, which the Courts have recognized. It further denied to the contracting parties the right to agree upon provisions for prices and other contract terms which they feel should apply during the long years of the contract. It denied the right of the parties to consent that the justness and reasonableness of the rates may be tested in the future when the economic conditions then existing are deemed to merit a change. The Order denied the hearings which are required by both Section 4 and 7 of the Act. The statutory scheme precludes the fixing of permanent ceilings of prices or other provisions involved in rate schedules and the fixing in advance of rates and terms for the extended period of twenty-plus years. This action is arbitrary on its face.

POINT 5 THE COMMISSION'S ACTION WAS DISCRIMINATORY AS TO SUPERIOR.

POINT 6 THE COMMISSION'S ACTION WAS UNREASONABLE, ARBITRARY AND CAPRICIOUS.

Superior is now selling and will continue to sell gas from the Aneth Field upon the terms and provisions of the original gas sales contract which has been approved by the Commissions as Superior's Gas Rate Schedule No. 77. Without a hearing, the Commission has held that Superior cannot sell gas from adjoining land from the same reservoir, in the same field and to the same buyer upon the same terms. Superior's filing was not a new contract, but only a supplement to its previously certificated and approved contract, which supplement was limited to adding adjacent acreage to that previously committed to the contract (R-107). In other words, the only change proposed was to extend the old certificate and rate schedule to include the newly discovered production from the same reservoir. This had been done twice previously and approved by the Commission (R-54, 64, 67, 71, 75, 78 and 87). All facts which justified the original certificate still exist and are of greater weight since no extension of buyer's facilities will be required to take delivery of the new gas. Yet, here the Commission arbitrarily refused to permit the filing so long as the provisions of the previously approved and now effective contract would apply to the extension of the productive area. This in itself is arbitrary discrimination.[3]

Exactly which provisions are found objectionable are not specified in the rejecting order. The Commission only stated

[3] "This contention is that another independent producer in the same field, Gulf Oil Corporation, selling to the same buyer under the same contract filed * * * a change in Rate Schedule asking for * * * the approval of the periodic escalation clause as applied to it. On April 6, Gulf was advised that the raise requested had become effective as requested.

"Obviously, any such arbitrary differentiation without any distinction as to the proceeding is not permissible". *Episcopal Theological Seminary* v. *FPC* (D.C. Cir. 1959) 269 F. 2d 228, 237, Cert. denied (1959) 361 U.S. 895, 80 S. Ct. 197, citing *Atlantic Seaboard Corp.* v. *FPC* (4 Cir. 1953) 201 F. 2d 568, 571.

that it *"appears"* that the supplement might incorporate some provisions other than those permissible under its Order No. 242 (R-120). Order No. 242 (R-121) proscribes "indefinite pricing provisions" in general. It defines an "indefinite" pricing provision as one that consents to the changing of the contract price in any amount or by any method other than in a fixed amount at a fixed date, except for tax reimbursement and a single redetermination which is so circumscribed as to be of no practical effect.

Under the statutory scheme of regulation, the contractual consent of the buyer is a necessary preliminary to the seller's filing to invoke the jurisdiction of the Commission to prove the justness and reasonableness of a proposed price or rate. *Mobile, supra.* The only effect of the rejected provisions (if they *exist* rather than *"appear"* to exist) is that the buyer consents to such a filing by the seller. Such provisions cannot possibly result in any increase in rates and charges which is not just and reasonable and which is not related to the economic needs of the seller, because the provision is subject to the supervisory powers of the Commission under Sections 4 and 5 of the Act. But here the Commission has arbitrarily denied the right of Superior to invoke the jurisdiction of the Commission and to offer evidence to prove the justness and reasonableness of its future rates under whatever standard of "just and reasonable" is properly being used at that time. The Commission has denied the right of the buyer to consent to such procedure. In effect, the Commission has rejected such future rates in advance and without hearing any evidence solely on the specious statement that any such future change in rates cannot have any possible relation to the economic needs of the seller at such future time. This prejudging of unknown future conditions and facts upon unknown evidentiary standard

s patently arbitrary and capricious, particularly when the economic needs of the particular seller may not even be he basis of determining the reasonableness of such future ates.[4]

In rejecting this filing, the Commission has also discriminated against Superior. Pipelines have long operated nder indefinite pricing provisions. See *Memphis, supra*, *Mississippi Power & Light Co.* v. *Memphis Natural Gas o.* (5 Cir. 1947) 162 F. 2d 388, and *Pacific Natural Gas o.* v. *FPC* (9 Cir. 1960) 276 F. 2d 350, 352. The Supreme ourt said that after the expiration of the fixed term of ears of a gas sales contract, the seller will be at liberty o file changes in rates whenever it feels that the changes n be supported. *Sunray Mid-Continent Oil Co.* v. *FPC*, 1960) 364 U.S. 137, 155, 80 S. Ct. 1392, 1403. That pipeines are permitted to operate under indefinite pricing proisions, and that producers can operate under indefinite rovisions after the expiration of their contracts, but that uperior's filing of a contract containing such a provion is rejected without hearing is arbitrary discrimination against Superior.

The arbitrary action of the Commission and its discrimiatory action violate the Fifth Amendment. *St. Joseph tock Yards Company* v. *U. S.*, (1936) 298 U.S. 38, 51-52, S. Ct. 720; *Northern Pacific R. Co.* v. *Department of ublic Works*, (1925) 268 U.S. 39, 44-45, 45 S. Ct. 412; *merican Liberty Oil Co.* v. *FPC*, (5 Cir. 1962) 301 F. 2d 1, 18 (where the Commission in its brief admitted that "rbitrary whimsical or capricious action" of the Comission is invalid); *Sohio Petroleum Company* v. *FPC*,

[4] Under General Policy Statement No. 61-1 (25 F.R. 9578), whether the standard to be used is the economic needs of the filing seller is much in doubt: i.e.—"Our determination will be in the nature of setting a price for the gas itself * * * and not necessarily a price applicable solely to the party proposing some other price."

(10 Cir. 1961) 298 F. 2d 465, 467-468; *J. M. Huber Corp.* v. *FPC,* (3 Cir. 1961) 294 F. 2d 568, 569; *Pure Oil Company* v. *FPC,* (7 Cir. 1961) 292 F. 2d 350, 353. As Mr. Chief Justice Warren said in *Bolling* v. *Sharpe,* (1954) 347 U.S. 497, 499, 74 S. Ct. 693, although there is no "equal protection of the laws" clause in the Fifth Amendment, and although the two phrases cannot be used interchangeably, yet the Supreme Court has recognized that discrimination if unjustifiable can amount to a denial of due process of law in violation of the Fifth Amendment.

While the matters brought to the attention of the Court under the foregoing Points of Error are deemed fully sufficient to establish why this proceeding must be reversed and remanded to the Commission for a hearing, still, as Superior believes that there is much merit to the following Points which deal with the validity of Order No. 242 itself, the attention of Your Honors is most earnestly directed to each of such Points, unless, of course, from your examination of the record and your application of the law to the facts as given under the foregoing Points you should deem it proper to reverse and remand this case without further examination of the record or authorities.

POINT 7 THE COMMISSION'S ACTION HEREIN, INSOFAR AS IT WAS BASED ON SECTION 154.93 AND SECTION 154.100 OF ITS REGULATIONS, AND ITS ORDER NO. 242 PROMULGATING THE HEREIN MATERIAL PORTIONS OF SAID REGULATIONS, IS INVALID FOR THE REASON THAT SAID ORDER NO. 242 AND THE REGULATIONS

BASED THEREON ARE UNLAWFUL FOR EACH OF THE ABOVE STATED REASONS "1" THROUGH "6". SAID ORDER PURPORTS TO DETERMINE SUBSTANTIVE RIGHTS OF SUPERIOR AND SIMILARLY SITUATED PRODUCERS, BUT WAS ENTERED WITHOUT AN OPPORTUNITY FOR HEARING.

POINT 8 COMMISSION ORDER NO. 242 HAS NEVER BEEN JUDICIALLY CONSIDERED. THIS SITUATION PRESENTS THE FIRST OPPORTUNITY OPEN TO SUPERIOR TO RAISE THE ISSUE OF THE UNLAWFULNESS OF ORDER NO. 242 BEFORE ANY REVIEWING COURT.

I. Background of Order No. 242.

Due to the peculiar nature of its business, various types of indefinite or flexible pricing provisions have been used by the natural gas industry since the mind of man runneth not to the contrary. Such provisions have been used in both regulated and unregulated sales ever since long-term contracts have been used. Perhaps the most popular clause is the "Memphis type" provision by which the buyer agrees that the seller may file changes in price at any time "Seller may find necessary * * * to assure Seller just and reasonable rates and charges as well as a rate sufficient to service the Seller's debt, attract capital, insure expansion and provide adequate natural gas service to all Seller's customers." *Nevada Natural Gas Pipe Line Co.* v. *Federal Power Commission* (5 Cir. 1959) 267 F. 2d 405, 407, 409; *Memphis, supra.*

The so-called "favored nation" clause is that the buyer agrees to pay the highest price which it pays under similar

contracts within a stipulated area. *Texas Gas Transmission Corp.* v. *Shell Oil Company* (1960) 363 U.S. 263, 80 S. Ct. 1122; *Warren Petroleum Corp.* v. *FPC* (10 Cir. 1960) 282 F. 2d 312, *Bel Oil Corp.* v. *FPC* (5 Cir. 1958) 255 F. 2d 548, cert. den. 358 U.S. 804, 79 S. Ct. 46 (1958). A parallel provision is that where the seller agrees to sell for the lowest price it charges in similar sales. *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.* (5 Cir. 1947) 162 F. 2d 388; cert den. 332 U.S. 770, 68 S. Ct. 82. In another flexible clause the buyer agrees to a price based on the price it receives on resale. *Kerr-McGee Oil Industries, Inc.* v. *FPC* (10 Cir. 1958) 260 F. 2d 602. In another, the parties agree to a price based upon prevailing price in the field. *Cities Service Gas Producing Co.* v. *FPC* (10 Cir. 1956) 233 F. 2d 726. In still another the price was based on the weighted average royalty rate in the area. *Phillips Petroleum Co.* v. *FPC* (10 Cir. 1958) 258 F. 2d 906, 908. Numerous other flexible clauses have been used such as adjustments for prices of competing fuels, adjustments for changes in economic indexes, etc.

These flexible pricing provisions have particular value in the gas industry. The parties to a gas sales contract are well aware that contract prices are subject to Commission review to determine the justness and reasonableness thereof, and that all that they actually accomplish in their contract by flexible price provisions is to provide the contractual consent which is prerequisite to filing with the Commission. If the sale is under contract, the term of years is long — typically twenty-plus years — due to problems of financing and Commission regulations. Further, if the sale is regulated once deliveries have commenced, they cannot be discontinued as long as the supply (reserve) lasts, unless the Commission gives specific permission. Delivery rates are frequently computed to insure that reserves will last 2

ears. The parties to a sale are compelled to anticipate hanges in economic conditions and in their own economic ositions and requirements for this extended period. Eco- omic conditions in the last 20 to 25 years have changed aterially. Inflation has almost become a national policy. he ten-cent hamburger now costs thirty-five cents. The wo-cent stamp will not carry even the traditional penny ostcard. Other costs and expenses have kept pace. The arties to a gas sale must anticipate that such changes will ntinue. This has long been recognized by the Courts. n the old *Bluefield* case, *Bluefield Waterworks and Improvement Co.* v. *Public Service Commission* (1923) 262 .S. 679, 693, 43 S. Ct. 675, 679, the Court said:

> "A rate of return may be reasonable at one time, and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions generally."

nd, the Court in *Memphis, supra,* recognized the need for xibility in the prices in the industry (p. 113-114),

> It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake. Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sum necessary for the maintenance and expansion of their systems through equity and debt financing would become most difficult, if not impossible. This concern was surely a proper one for Congress to take into account in framing its regulatory scheme for the natural gas

> industry, cf. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603, and we think that it did so not only by preserving the 'integrity' of private contractual arrangements for the supply of natural gas, 350 U.S. at 344 (subject of course to any overriding authority of the Commission), but also by providing in §4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate Commission review."

The Supreme Court, *Sunray Mid-Continent Oil Company* v. *FPC* (1960) 364 U.S. 137, 80 S. Ct. 1392, has further said that if deliveries are continued after the expiration of the term of years stipulated in a gas sales contract,

> "The identical provisions of the Natural Gas Act regulate pipeline companies as well as independent producers." (143)

and,

> "The obligation that petitioner will be under after the contract term will not be one imposed by contract but by the Act. It will be free then, as it was not free during the contract term under the contract here in question, to make rate changes under Sec. 4 without United's consent." (155)

After the Supreme Court issued its decision in *Mobile*, *supra,* the Commission recognized that it had no power to outlaw indefinite pricing clauses and for 5 years, from 1956 through 1961, the Commission petitioned the Congress to grant such power. In the 36th FPC Annual Report to Congress (1956), based upon its first complete year of regulatory experience with producers, at pages 17-19, the Commission requested that the Act be amended to provide th

> "* * * elimination of clauses in independent producers' contracts of sale to interstate gas transmission companies which contain provisions for a change of price to the purchaser by reason of (a) changes in price

received by the purchaser on resale, or (b) the payment or offer of payment of different prices by the purchaser or other purchasers to the seller or other sellers."

Similar amendments of the Act were recommended by the Commission in its 37th FPC Annual Report (1957), p. 17-8 and p. 25-26; 38th FPC Annual Report (1958) p. 15-16; 39th FPC Annual Report (1959) p. 12-13 and p. 18-19; and 40th FPC Annual Report (1960) p. 15-17.

It is a well-settled rule of law that an unsuccessful attempt by an administrative body to secure an express grant from Congress is significant in determining whether the power so requested was conferred by the statute sought to be amended or supplemented. *FTC* v. *Bunte Bros, Inc.* (1941) 312 U.S. 349, 351-352, 61 S. Ct. 580; and *FCC* v. *American Broadcasting Company, Inc.* (1954) 347 U.S. 284, 74 S. Ct. 593. Here the Commission has made not only one unsuccessful attempt to secure the express grant of power over these indefinite pricing provisions, but repeated such unsuccessful request or attempt five times.

During this period, not only the Commission but the courts recognized the validity of these "indefinite pricing provisions" and interpreted, applied and enforced them where their terms were applicable or refused to enforce them where not applicable by their terms. Thus, *Memphis, supra,* and *Willmut, supra,* held valid the right of sellers to make filings under sale contracts by which the buyers agreed to pay the "going rate" approved by the Commission under Section 4. Provisions for renegotiations based on prevailing field prices were interpreted in *Cities Service Gas Producing Company* v. *FPC* (10 Cir. 1956) 233 F. 2d 676, 727; adjustments based on changes in buyers resale price were considered in *Kerr-McGee Oil Industries, Inc.* v. *FPC* (10 Cir. 1958) 260 F. 2d 602; adjustments based on weighted average royalty rates were enforced in *Phillips*

Petroleum Company v. *FPC* (10 Cir. 1958) 258 F. 2d 906, 908; and 'favored nation clauses' based on prices paid within specified area were interpreted in *Texas Gas Transmission Corp.* v. *Shell Oil Company* (1960) 363 U.S. 263, 80 S. Ct. 1122; *Warren Petroleum Corp.* v. *FPC* (10 Cir. 1961) 282 F. 2d 312; *Bel Oil Corp.* v. *FPC* (5 Cir. 1958) 255 F. 2d 548, 554; and *Arkansas-Louisiana Gas Co.* v. *United States* (Ct. Claims 1961) 291 F. 2d 936. The purpose of these various "indefinite pricing clauses" was to provide the contractual consent which is a prerequisite to filing with the Commission for a change in rate. During all of this period, it was recognized by the courts and the Commission that such consent could be granted by the contract and by the initial rate-making and rate-changing right of the natural gas companies. After its failure to secure the express grant of the power to outlaw these types of provisions, the Commission, in 1961, decided to proceed on its own without benefit of Court or Congress.

On March 3, 1961 the Commission issued Order No. 232 which it amended by Order No. 232-A on March 31, 1961 (26 F.R. 2850, amending 18 C.F.R., Sec. 154.93, Appendix p. 17a). These Orders provided that in contracts tendered for filing after April 2, 1961, all price changing provisions would be inoperative except (a) those providing for a specific amount at a specific date, (b) those permitting, once in a 5-year period (during which there is no other change provided) a redetermination at a definite date based solely on prices previously approved by the Commission in the area and not contested, and (c) those providing for a change to reimburse for changes in production, severance or gathering taxes levied upon the seller. These Orders were held to be rules of general application and not reviewable until specifically applied to a particular seller. *Sun Oil Company* v. *FPC*, (5 Cir. 1962) 304 F. 2d 290.

On February 8, 1962 the Commission issued Order No. 242 (18 C.F.R. 154.93, 157.14, 157.25, 27 F.R. 1356, Appendix p. 13a). This Order stated that filings under indefinite escalation clauses

> " * * * bear no apparent relationship to the economic requirements of the producers who file them. The Natural Gas Act contemplates that prices, to be just and reasonable, be related to economic needs."

The Order further stated that filings under indefinite clauses have

> " * * * created a significant portion of the administrative burdens under which this Commission is laboring today. The Natural Gas Act contemplates that rate increases shall be sought when there is economic justification, * * * the complexity of indefinite price clauses requires it to spend an undue amount of time in their interpretation and application at the expense of making a prompt determination of the rate issues involved."

The Commission thought its rule would make "the tasks" of regulation more manageable. This rule provided that the Commission would reject as a rate filing any contract executed on or after April 2, 1962 containing price changing provisions other than those permitted by its Orders Nos. 232 and 232-A (Sec. 154.93, see Appendix, p. 16a). It further provided that any certificate application would be rejected if any contract involved contains any such price-changing provision (Sec. 157.25, see Appendix, p. 16a).

Superior along with others filed for a rehearing on this Order, and appealed the Commission's denial of rehearing. The Order was held not reviewable until such time as it would be specifically applied to the aggrievement of a party. *Hunt Oil Company et al* v. *FPC* (5 Cir. 1962) 306 F. 2d 878.

When Superior entered into a supplemental contract extending the acreage which was subject to its 1958 gas sales contract in the Aneth Field (R-104) and filed such contract as a Supplement to its Rate Schedule No. 77 (R-104) and incorporated such supplemental contract in its Amendment to Application for a Certificate (R-111), the Commission's Secretary by Letter-Order rejected such filings (R-120). Such action of the Commission aggrieved Superior and is the genesis of this suit. The Letter-Order stated that the "additional sale" was to made pursuant to the supplemental contract

> "* * * which, in effect, incorporates by reference the terms of a contract dated June 11, 1958. The supplemental agreement appears, therefore, to incorporate by reference pricing provisions other than those permitted by Section 154.93. * * * This rejection is without prejudice to the resubmittal of the subject filing upon deletion of the unacceptable provisions." (R-120-121)

II. Order No. 242, Providing for Rejection of Filings Without a Hearing, Not Only Violates the Natural Gas Act But Also Denies Due Process of Law.

Order No. 242 has here been applied to Superior; and Superior is aggrieved. Thus Superior is entitled to a hearing to make a record upon which such Order as well as the Letter-Order may be reviewed. This non-reviewable ex parte Order No. 242 means that the Commission will reject without a hearing any filings of Superior whether a new contract or a change in rate (as was rejected here) or an application for amendment of the certificate, if such filing has any flexible pricing provision except the one providing for limited re-negotiation based on prior Commission approved prices. All of this was done without a hearing.

The Letter-Order rejecting Superior's filings did not indicate in what respects it "appeared" to incorporate pricing provisions proscribed by Order No. 242. The original contract is a casinghead gas contract covering the sale of gas produced from oil wells. It is thought that the principal objection of the Commission is to the re-negotiation provision (Section 8, R 31-32) and the short favored nation provision (Section 9, R-32). The redetermination provision is that for any 5-year contract period after the initial five years, seller may request a redetermination of the "then reasonable market price of gas" which shall be based on "all pertinent factors" (R-31). The favored nation clause provides that the price paid "shall never be less than the price being paid by Buyer to others for comparable gas delivered under comparable conditions" within the stipulated area (R-32).

If given the opportunity at a hearing, Superior would show that these particular clauses have a definite relation to the economic requirements of Superior and to the economic conditions of the country and of the industry, and that the circumstances of Superior's operations in general and in the Aneth Field not only justify but require this type of indefinite pricing provision if there is to be any relation between the price for which Superior files in the future and the economic conditions then existing and the economic requirements of Superior. The Commission's justification for Order No. 242 was that there was no economic relation between filings for prices under indefinite price provisions and prices which are just and reasonable. Superior's evidence would conclusively demonstrate that the particular types of flexible pricing provisions used in its contract are much more closely related to economic conditions and requirements than are the price provisions permitted by Order No. 242.

Superior's filings were under both Sections 4 and 7 of the Act. Each of these Sections requires a hearing prior to a substantive determination of the lawfulness of a rate or the existence of public convenience and necessity.

Superior's filing for the amendment of its certificate was under Section 7 of the Act. This Section provides for permanent certificates to be issued only after a hearing and finding upon the public convenience and necessity based upon the standards set out in the Act. Section 7(c) contains a Grandfather Clause and then states

> "* * * in all other cases the Commission shall set the matter for a hearing * * *",

except for the issuance of a temporary certificate, and there is no question of temporary certificate here. The statutory standards are set out in Section 7(e) which also permits the Commission to attach reasonable conditions on a permanent certificate *after the hearing.* But any such condition is not a change in the contract provision; because as the Court said in *Texaco, Inc.* v. *FPC,* (5 Cir. 1961) 290 F. 2d 149, 156, the condition substituting a lower initial price did not amend the contract,

> "However, we think it appropriate to say that we find no authority for holding that a producer does not have the right immediately to file a proposed rate increase of 20 cents per Mcf after complying with the condition that it file a new schedule carrying an initial price of 17.7 cents in lieu of the 20 cent rate in the contract."

This was the case which affirmed the Commission Order which granted the permanent certificate covering Superior's Rate Schedule No. 77, which is the original contract here involved. Order No. 242 requires the arbitrary rejection of each filing for a certificate which contains any of the

proscribed price provisions; while Section 7 of the Act requires a hearing before any action re the granting or denying of a permanent certificate.

Order No. 242 also conflicts with Sections 4 and 5 of the Act. Superior's change of rate schedule was filed under Section 4(d). As stated in *Mississippi River, supra,* p. 902 and *Willmut, supra,* p. 248, upon such filing the Commission can either permit the change to become effective or can enter upon a hearing under Section 4(e) to determine the lawfulness of such filed rate under the statutory standards of justness and reasonableness. It *cannot* decide upon the justness and reasonableness *until after a hearing.* Section 5 permits the Commission to commence investigations upon its own initiative, but this Section also *requires a hearing* before decision. Thus Order No. 242 on its face violates Sections 4 and 5 of the Act. *FPC* v. *Natural Gas Pipeline Company of America* (1942) 315 U.S. 575, 583-584, 62 S. Ct. 736.

All orders under these Sections must be supported by substantive evidences upon which the Commission's findings must be based. *Colorado-Wyoming Gas Company* v. *FPC* (1945) 324 U.S. 626, 634, 65 S. Ct. 850; *Braniff Airways, Inc.* v. *CAB* (D.C. Cir. 1962) 306 F. 2d 739, 742. Order No. 242 is not so supported.

There is no basis in the Act for the Commission to adopt such an order as Order No. 242 which adjudicates the substantive rights of Superior without a hearing. *Willmut, supra,* p. 250, says that the Commission cannot place a limitation on the right to file. See also *Mississippi River Fuel Corp.* v. *FPC, supra; Warren Petroleum Corp.* v. *FPC* (10 Cir. 1960) 282 F. 2d 312, and *United States* v. *Ekberg* (8 Cir. 1961) 291 F. 2d 913, 921.

The Commission has denied Superior's right to file and its right to contract without a hearing. It has prejudged

Superior's future economic needs without any basis whatsoever. Superior has had no opportunity to test the validity of this *ex parte* Order No. 242 or to prove its economic needs. The fundamental concept of due process of law involves the right to a hearing, to offer evidence and to hear the evidence against the aggrieved party. *Morgan* v. *United States* (1938) 304 U.S. 1, 58 S. Ct. 773, 1 *Am. Juris.* 2d 955, 957; *Hannah* v. *Larche* (1960) 363 U.S. 420, 80 S. Ct. 1502, *NLRB* v. *Prettyman* (6 Cir. 1941) 117 F. 2d 786; *Philadelphia Co.* v. *SEC* (D.C. Cir. 1948) 175 F. 2d 808, 817. Order No. 242 by requiring this rejection of filings without a hearing has denied due process. Thus the Commission has pyramided denial of rights upon denial of rights.

III. The Commission Exceeded Its Power In Issuing Order No. 242.

There is no basis in the Natural Gas Act to support an order such as Order No. 242. Administrative agencies are the creatures of statutes. The powers of each administrative agency are limited to the powers granted by the creating statute and any act exceeding such power is void. *Social Security Board* v. *Nierotko* (1946) 327 U.S. 358, 369, 66 S. Ct. 637, 643; *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express* (1956) 251 U.S. 49, 54, 76 S. Ct. 574; *United States* v. *Fort Belknap Irrigation District* (D. Mont. 1961) 197 F.S. 813, 822.

A. Order No. 242 violates the statutory scheme of Regulation.

The statutory scheme of regulation as set out in the Act and interpreted by the courts is that rates are established initially and changed by the natural gas companies. The right to contract existed prior to the Act and was not changed by the Act, which expressly recognized it. Changes in rates are made by the gas companies. Filing with the

Commission is required by the Act as a matter of notice, and this filing actually affects the change made by the gas companies. The Commission can only review rates made and changed by the gas companies after they have been filed. A gas company cannot commence deliveries under its contract, even after it has been filed, without applying for and receiving a Certificate of Public Convenience and Necessity from the Commission. This statutory scheme is outlined by the Supreme Court in *Mobile, supra,* pp. 338-343, and in *Memphis, supra,* pp. 110-113. It has been followed and reiterated by the courts of appeal many times. *Willmut Gas & Oil Company* v. *FPC* (D.C. Cir. 1961) 294 F. 2d 245, 248, 250, writ den. 368 U.S. 975, 82 S. Ct. 477; *Pan American Petroleum Corporation* v. *Kansas-Nebraska Natural Company* (8 Cir. 1962) 297 F. 2d 561, 569; *Amerada Petroleum Corporation* v. *FPC* (10 Cir. 1961) 293 F. 2d 572; *Sun Oil Company* v. *FPC* (5 Cir. 1960) 281 F. 2d 275, 277, and *Cities Service Gas Company* v. *FPC* (10 Cir. 1958) 255 F. 2d 860, 864, writ den. 358 U.S. 837. Order No. 242 seeks to change and limit the right of natural gas companies to contract and the right of natural gas companies to change rates. Order No. 242 rejects in advance filings required by the Act. Nowhere in the Act is the Commission granted the power to reject a filing of either a certificate application or a rate or any substantive matter in the filing. Order No. 242 violates the statutory scheme of regulation and exceeds the Commission's power and is void. *Manhattan General Equipment Co.* v. *Commissioner* (1936) 297 U.S. 129, 135, 56 S. Ct. 397; *Willmut, supra,* p. 250; *Mississippi River, supra,* p. 902-903.

1 Order No. 242 exceeds the rule-making power of the Commission.

Section 16 of the Act gives the Commission the authority t make orders, rules and regulations "necessary or appro-

priate to carry out the provisions of this act" (15 U.S.C. 717o). The Commission can only issue rules to carry out the purposes of the Act. Any other rule is a nullity. *Manhattan General Equipment Co.* v. *Commissioner* (1936) 297 U.S. 129, 134, 56 S. Ct. 397: *United States* v. *Eddy Brothers, Inc.* (8 Cir. 1961) 291 F. 2d 529, 531. Such section of the Act does not authorize the rule here at issue. There is no relation and can be no possible relation between the basic purpose of the Act and Order No. 242. The basic purpose of the Act is to secure adequate gas for the consumers at the just and reasonable rate. *FPC* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591, 603, 64 S. Ct. 281. The justness and reasonableness of a rate can only be decided after a hearing pursuant to Section 4 or 5 of the Act. The statutory scheme of regulation to obtain such purpose as set out in *Mobile, supra,* and *Memphis, supra,* is that the right and power to make and change rates are in the natural gas companies subject only to the power to review in the Commission *after a hearing* after which a finding is made that such rate or change in rate is or is not just and reasonable, and that deliveries cannot be commenced until *after a hearing* after which the Commission will find that the proposed sale is or is not within the public convenience and necessity. These procedures have been set out by Sections 4 and 7 of the Act *Mississippi River, supra,* and *Willmut, supra.* Order No. 242 attempts to change this and deny the right and power to make and change rates to the natural gas companies and deny the right of a hearing on such rates or changes. The purposes of the Act and this statutory scheme of regulation as set out in *Mobile, supra,* and *Memphis, supra,* and followed in numerous other cases cannot possibly be "carried out" by an *ex parte* order providing for summary rejection without a hearing on all filings which contain any provision relating to changing rates except the three types of provisions arbitrarily prescribed by the Commission. This

mounts to an attempt to alter the statutory purpose and scheme and to alter the rights recognized by the statute itself. This it cannot do. A right recognized by the statute cannot be taken away by rule or regulation. *Mississippi River, supra,* p. 902, *Willmut, supra,* p. 250: *Manhattan General Equipment Co.* v. *Commissioner, supra,* p. 134-135 *Northern Natural Gas Co.* v. *O'Malley* (8 Cir. 1960) 277 F. 2d 128, 134. The contractual right to file for a testing of the justness and reasonableness of a proposed rate or change in rate or to file to test the public convenience and necessity thereof does not prevent the consumer from getting his gas at the just and reasonable rate but only initiates the proceeding for determining such justness and reasonableness or such public convenience and necessity. The proscribed contract provisions deal only with the contractual consent to file with the Commission. Order No. 242 is not a matter of the *form* of the contracts, but is patently *substantive* and exceeds the rule-making powers of the Commission. It sets out the types of pricing provisions (by reference to prior orders) which buyers and sellers of natural gas will be permitted to include in their contracts.

The exact issue was considered in *Willmut, supra,* where the Court said at page 250-251:

> "In considering this contention, it is necessary to determine whether Section 16 of the Act authorizes the Commission to enter an order or adopt a rule or regulation which would permit it, in some circumstances, to refuse to receive for filing a new schedule showing changes in rates tendered by a natural gas company pursuant to the mandate of Section 4(d) * * *
>
> "* * * But the broad power granted by this statutory language does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to the require-

ments of Section 4(d) of the Act that it notify the Commission of the changes, so that it may proceed under Section 4(e) * * *

"The Commission was not authorized to reject the filing in this case on any ground appearing on its face. Its only statutory authority was to enter upon a hearing concerning the lawfulness of such rates, to suspend their effectiveness for a time, and after full hearing to make such orders with reference thereto as would be proper in a proceeding under Section 5(a) of the Act."

A similar situation was at issue in *FCC* v. *American Broadcasting Co., Inc.* (1954) 347 U.S. 284, 74 S. Ct. 593. This was a suit to enjoin enforcement of a rule by the Federal Communications Commission prohibiting "give away" programs. Like the Natural Gas Act, the Federal Communications Act has a specific grant of rule making power.[5] The parallel between the situation in that case and in our present case is market. The Court said (through Mr. Chief Justice Warren):

"It is apparent that these so-called 'give-away' programs have long been a matter of concern to the Federal Communications Commission; that it believed these programs to be the old lottery evil under a new guise, and that they should be struck down as illegal devices appealing to cupidity and the gambling spirit * * * without success, it urged Congress to amend the law to specifically prohibit them. The Commission now seeks to accomplish the same result through agency regulations. In doing so, the Commission has overstepped the boundaries of interpretation and hence has exceeded its rule-making power. Regardless of

[5] Section 4(i) of the Act (47 USC 154i) authorizes the Commission "make such rules and regulations, and issue such orders * * * as may necessary in the execution of its functions." Section 303(r), 47 USC 303 authorized the Commission to "make such rules and regulations and prescri such restrictions and conditions, not inconsistent with law, as may necessary to carry out the provisions of this chapter; * * *."

> the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of Section 1304 does not provide the remedy." (P. 296-297)

The Commission itself has recognized its lack of power n this type of order. In *Warren Petroleum Corporation . FPC* (10 Cir. 1960) 282 F. 2d 312, 315, Footnote 2, the Court said:

> "The Commission recognizes that initially the rates may be fixed by contracts between natural gas companies and customers and that the Act does not purport to define the rate-setting powers of the companies."

The Commission further recognized its absence of power outlaw indefinite pricing provisions during the five years each of which it petitioned Congress to amend the Act to rant such power.[6] The action of the Commission estabshes its lack of authority. *FTC* v. *Bunte Bros., Inc.* (1941) 12 U.S. 349, 351-352, 61 S. Ct. 580.

The very point at issue here was decided by the Supreme ourt in *Memphis, supra.* There the Court said that the ircuit Court had accepted the Commission's arguments at *Mobile, supra,* had established that indefinite pricing rovisions were illegal — that the filing of rate changes nder the Act "applies only to rate changes whose *specific mount* has been mutually agreed upon between a seller d purchaser, and that where a purchaser has not so greed, a rate change can be effected" *only by the initiative* the Commission under Section 5. (p. 108) But " * * * we d nothing in the scheme of the Natural Gas Act which ould justify the restrictive application which the Court o Appeals' decision gives to Section 4(d) and (e)." (p. 111)

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[6] See pages 26-27 above which outlines the 1956-1960 efforts of the Commission to secure such power by express statutory grant.

It then outlines these sections and its *Mobile* decision and concludes:

> "What has been said disposes of the question whether anything in the Natural Gas Act forbids a seller to change its rates pursuant to Section 4 procedures simply because its customers have not agreed to the amount of the rate as changed." (358 U.S. at p. 114)

In other words, the Court in *Memphis* considered the contention and held that nothing in the Act forbids indefinite rate changes (those to which customers have not agreed to the *"specific amount"*). The attempt of the Commission to forbid such changes by rule-making is obviously beyond the power of the Commission under the Act.

C. Order No. 242 attempts to amend the Natural Gas Act by rule and regulation.

When the Commission failed to secure congressional amendment of the Act granting power to outlaw flexible pricing provisions, and after the courts had enforced such provisions, the Commission set out on its own to assume such power by regulation. But the Commission cannot amend the Natural Gas Act. It can only issue rules and regulations to carry out the basic purposes of such Act. *Willmut, supra, Missisippi River, supra; Miller* v. *United States* (1935) 294 U.S. 435, 444, 55 S. Ct. 440. There is no relation and can be no relation between the basic purposes of the Act and Order No. 242. The basic purpose of the Act is to secure gas for the consumers at the just and reasonable price. *FPC* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591, 603, 64 S. Ct. 281. The justness and reasonableness can only be decided after hearing pursuant to Section 4 or 5 of the Act. The statutory scheme of regulation to obtain such purpose as set out in *Mobile, supra,* and in *Memphis, supra* is that the initial rate-making and rate-changing power

re in the natural gas companies subject only to review by he Commission after a hearing finding such rates and hanges in rates to be or not to be just and reasonable. The ct recognizes the right of natural gas companies to make nd change rates. The Act requires the filing of rates and hanges in rates made by natural gas companies to serve as otice to the Commission. The Act gives the Commission ne power to review any such filing. The Act provides that uch review will be by a hearing after which a finding must e made that the statutory standards have been met or have ot been met. As set out above, p. 40 ff, the Court in *Memphis* eld that there is nothing in the Act to forbid the agreeg upon or filing of indefinite pricing clauses or changes ereunder. Order No. 242 would change all this. It would eny the right of natural gas companies to contract. It ould deny the right of natural gas companies to comply ith the statutory requirements of filing. It would deny the ght of natural gas companies to make and change rates. would deny the statutory hearings and ignore the statutry standards to be applied. It would ignore the requireent for a finding based upon evidence. Thus, by Order o. 242, the Commission seeks to amend the Act by rule. his it cannot do. *Manhattan, supra,* p. 135; *Northern atural, supra,* p. 134. In *Mississippi River, supra,* the ommission had rejected without a hearing a filing of ange in rate schedule. The Court held such action to be yond the authority of the Commission (p. 901) and added 03):

> "If changes in the law are needed * * * it is not for the administrative agency or the courts to try to make up for this deficiency * * *. It follows that the Order of May 29 must be set aside as wholly beyond the authority of the Commission."

gain, in *Willmut, supra,* where the contention had been de that Section 16 of the Act authorized the Commission

to adopt a rule or regulation which would permit it t refuse to receive the filing of changes in rates, the Cour said (250):

> "Thus, it seems clear than such an order or regula tion would amount to a legislative change which i beyond the authority of the Commission."

The Commission cannot amend the Act by regulation o rule.

Thus in issuing Order No. 242, the Commission exceede its authority by (1) violating the statutory scheme of reg ulation; (2) by exceeding its rule-making power; and (3 by attemping to amend the Act by rule or regulation Order No. 242 is invalid on all three grounds.

IV. Order No. 242 is Arbitrary, Capricious, Unreasonable and Discriminatory.

Without a hearing, the Commission has held that Su perior cannot sell gas in the same field and from the sam reservoir upon the same terms and provisions as it ha sold and will continue to sell gas from other lands wit Commission approval. The Commission has refused t permit the buyer and seller to agree that facts which the believe to justify a change in prices can be submitted t the Commission, if and when they occur.

Superior's filing was not a new contract but only a sup plement to its previously certificated contract for the lin ited purpose of adding adjacent acreage to that previous committed and to include the gas produced therefrom - to extend the old certificate and rate schedule to inclu newly discovered production adjacent to the old produ tion and from the same reservoir. This had been do twice previously and approved by the Commission. (R-5

4, 67, 71, 75, 78 and 87). All facts which justified the riginal certificate still exist and are of greater weight, ince no expenditure for extension of the buyer's facilities ill be required to take the new gas. Yet, here the Commission has arbitrarily refused to permit the filing so long s the provisions of the previously approved contract shall pply to the new production. This, in itself, is arbitrary iscrimination. *Sohio Petroleum Co.* v. *FPC,* (10 Cir. 1961) 98 F. 2d 465; *Episcopal Theological Seminary* v. *FPC,* D.C. Cir. 1959) 269 F. 2d 228, 237. The outlawed provisions cannot possibly result in any price which is not ist and reasonable and which is not related to the economic needs of the Seller, because such provisions are ubject to Section 4 of the Act. At the risk of repeating, should be clearly understood that the Seller under a gas ales contract has neither the right, nor the power, nor a method by which it may invoke the jurisdiction of the ommission to accept proof as to the justness and reasonableness of any change in rates unless the buyer contractually consents to the filing which is necessary to invoke such jurisdiction. Here the Commission has denied te right of Superior to invoke such jurisdiction and to offer evidence to prove the justness and reasonableness of its future rates and has denied the right of the buyer t consent to such procedure. The Commission has rejected such future rates in advance and without a hearing o evidence, on the specious statement that the agreement o the buyer and seller that the seller may test the justness and reasonableness of its prices at indefinite future times when seller feels that such a test is justified by the facts as they then exist has no relation to the economic needs of Seller at such time. The Commission's present action is without regard as to what the future economic needs of the Seller may be. The Commission has, in fact,

prejudged the future economic requirements of Superior and every other seller without any basis in fact and without any hearing at which the facts can be introduced. It has fixed the reasonableness of Superior's future costs and prices by determining them, in advance ex cathedra. The specific facets of this arbitrary and capricious action will be more fully discussed below.

It has often been held that such arbitrary, capricious unreasonable and discriminatory actions by administrative agencies deny due process of law. In *Bolling* v. *Sharpe* (1954) 347 U.S. 497, 74 S. Ct. 693, Mr. Chief Justice Warren directed attention to the absence of the "equal protection clause" in the Fifth Amendment, but added (499):

> "But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law', and therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

See also Marquez v. Aviles, (1 Cir. 1958) 252 F. 2d 715; *Pacific Natural Gas Company* v. *FPC,* (9 Cir. 1960) 27 F. 2d 350, 353; *Railway Express Agency* v. *People of New York,* (1949) 336 U.S. 106, 112-113, 69 S. Ct. 463; *St. Joseph Stock Yards Co.* v. *United States,* (1936) 298 U.S. 38, 51-52, 56 S. Ct. 720; *American Liberty Oil Co.* v *FPC* (5 Cir. 1962) 301 F. 2d 15, 18; *J. M. Huber Corp.* v. *FPC* (3 Cir. 1961) 294 F. 2d 568, 569; *Pure Oil Co.* v. *FPC* (7 Cir. 1961) 292 F. 2d 350, 353; *Northern Pacific Railway Co.* v. *Department of Public Works,* (1925) 268 U.S. 39, 44-45, 45 S. Ct. 412.

A. Order No. 242 attempts the rigid control of future negotiations.

Order No. 242 only permits Superior or any other seller to test the justness and reasonableness of its prices to the extent which the Commission has previously approved a price for some other seller in a proceeding to which Superior will not necessarily be a party. This makes any permitted renegotiation subject to rigid Commission control. The Commission has attempted to determine and fix a ceiling upon Superior's rates for the next twenty years. Such a maximum ceiling is arbitrary on its face. Economic conditions have changed much in the last twenty years. The courts will take judicial notice of such inflationary trends. *Panton* v. *Belt Line Ry. Corp.* (1925) 268 U.S. 413, 422, 45 S. Ct. 534. Economic conditions will continue to change during the next twenty years. It is recognized that production problems increase as gas fields increase in age. However, the Commission has, by ukase, decreed that Superior and its buyer cannot agree that matters of inflation, maintenance of pressure problems and other economic and operating facts can be used to test the justness and reasonableness of the price of their gas in the distant future. In the absence of inflation or other economic and producing factors to justify a future increase, the proscribed provision will never be activated and no harm can possibly result from such provision. No one can be aggrieved by such contractual consent provisions.

The Commission has denied to the parties the right to agree on provisions for prices which they feel should apply during their long-term contract. The action of the Commission is not necessary nor appropriate to carry out the provisions of the Natural Gas Act. When the Commission arbitrarily rejects any provision of a contract, it has denied due process by denying to the parties the contract power.

Actually, the Commission is attempting to compel the pa ties to amend their existing contract, which is, in itself, denial of due process. *Bolling* v. *Sharpe,* and cases cite *supra.*

B. Superior has been denied the opportunity to test Order No. 242.

The Commission has arbitrarily denied to Superior th right to make the filing and offer the evidence which i necessary to test the validity of Order 242 and Sectio 154.93 and Section 154.119 of the Commission's Regulation Such orders are not subject to judicial review themselve *Hunt Oil Company* v. *FPC* (5 Cir. 1962) 306 F. 2d 878; an Superior is here denied a right to make a record on th direct application of such orders to it. Thus Superior i prevented from ever having a hearing on the merits t determine the propriety of including the proscribed pr visions in its contract and at the same time is denied th right to have a hearing on the justness and reasonablene of its prices. This appeal presents Superior's first oppo tunity to raise the issue of the unlawfulness of Order N 242.

C. The bases for Order No. 242 as set out therein are frivilous and capricious.

None of such "reasons" are supported by findings as r quired by law. *Colorado-Wyoming Gas Company* v. *FP* (1945) 324 U.S. 626, 634, 65 S. Ct. 850; *Braniff Airways In* v. *CAB* (D.C. Cir. 1962) 306 F. 2d 739, 742-743. None such "reasons" are related to the purpose of the Act. *Soci Security Board* v. *Nierotko* (1946) 327 U.S. 358, 369; S. Ct. 637, 643.

1. The Commission said that the provisions were "i compatible with a scheme of effective rate regulation

Appendix p. 14a). It did not claim that they were incompatible with the scheme of *statutory* regulation. It ignored the regulatory scheme set up by the statute and interpreted by the Courts in *Mobile, supra,* and cases cited, *supra,* p. 15-18. It ignored the statutory standards of justness and reasonableness set up by Sections 4 and 5, and of public convenience and necessity set by Section 7 of the Act.

2. The Commission said that "the question is whether the rule is rationally related to a condition which requires correction if regulatory objectives embraced by the statute are to be achieved." (Appendix, p. 14a). It did not say if the *purposes* of the statute are to be achieved", which is the limitation on its rule-making powers, *United States* v. *Eddy Brothers, Inc.* (8 Cir. 1961) 291 F. 2d 529, 531; *FCC* v. *American Broadcasting Co., Inc.,* (1954) 347 U.S. 284, 296-297, 74 S. Ct. 593. It scrupulously avoided the procedures set up in Section 4, 5 and 7 for correcting any such conditions. *Mississippi River, supra,* p. 902; *Willmut, supra,* pp. 248 and 250.

3. The Commission said:

> "These filings bear no apparent relationship to the economic requirements of the producers who file them. The Natural Gas Act contemplates that prices to be just and reasonable, be related to economic needs. * * *
>
> "The Natural Gas Act contemplates that rate increases shall be sought when there is economic justification, * * *
>
> "Accordingly, in protecting the public against waves of increases which have no defensible basis, * * * " (Appendix, p. 14a-15a)

The tongue-in-cheek references to the lack of any relation between flexible price provisions and the economic needs

of the seller are pure and simple casuisms.[7] The fact is that the types of flexible provisions included in Superior's rejected filings and many other tabooed flexible price provisions do have a very definite relation to economic requirements and economic justifications and do have a defensible basis. The only price provisions which can possibly have any realistic relation to the seller's economic needs must be indefinite. The two types of increases permitted by the Commission's orders (those other than the tax reimbursement) have no relation to economic requirements of the seller or economic factors whatsoever. Yet the Commission has attempted to outlaw every pricing provision which has such relation by condemning it for having no such relation. This is the application of the old Hilterism of trying to make a statement true by repetition.

To begin with, a fixed escalation at a definite time in the future, when agreed upon today, obviously can have no possible relation or connection with the economic requirements of the seller at such future time or with the existence of facts for economic justification at such time. Such fixed escalation is not even an "educated guess". It is only a *negotiated* guess as to future facts and conditions. It is speculative.

A renegotiation at a date more than five years in the future which date must be definitely set today and which renegotiation is limited to consideration of prices of other sales in the area which have been previously approved by the Commission and have been questioned by no one, cannot consider "all pertinent factors", and cannot consider the

[7] The sincerity of the Commission in its references to the "economic requirements of the producers who file" and to "just and reasonable" is questioned by the Commissions own General Policy Statement No. 61-1 (25 F.R. 9578) which raises grave doubts that the standard of justness and reasonableness which the Commission intends to use is the economic needs of the filing seller. The Commission said: "Our determination will be in the nature of setting a price for the gas itself * * * and not necessarily a price applicable solely to the party proposing some other price."

economic requirements of the seller or any economic condition or factor other than prices previously approved by the Commission. No one in the area can renegotiate unless and until the Commission has approved a higher price for someone in the area. Thus in renegotiating we must turn to some fixed escalations agreed upon in the area. Fixed escalations have been demonstrated to be speculative. There can be no necessary relation between Superior's economic requirements or Superior's ability to justify economically the defensible bases of Superior's price, and the fact that no one else in the area has some years previously agreed upon a price which the Commission has approved and no intervenor has contested. The Order places strict limitations on the right of the parties to contractually consent that in the future a filing for a different price may be made with the Commission.

On the other hand, the flexible pricing provisions of Superior's rejected contract have a very definite relation to Superior's future economic needs and to economic justification and have a defensible basis. Any renegotiation of the "reasonable market price" by the parties must consider "all pertinent factors" (R-31). This must of certainty include economic conditions and Superior's economic defensibility. The favored nation clause recognizes the economic fact that higher prices to other sales will be paid by the buyer only as the result of economic conditions. Experience with regulation has taught Superior and other producers that it is futile to file for an increased rate unless it can hope to defend such filing by economic requirements. But Order No. 242 denies to Superior and others the right and opportunity to prove such economic justification. Other flexible provisions than those contained in Superior's contracts may be even more closely related to economic needs. But the Memphis type clause permitting filing at will, the

clause based on economic or price indices, etc., etc., are al outlawed for producers. Since the price of every sale is regulated by the Commission and the effectiveness of ar agreement to change will depend upon its justness and rea sonableness at the applicable time, the wisdom and desir ability of agreeing upon flexibility for filing price changes is obvious. No filing of a rate or rate change under a con tract can be made without contractual consent to the filing The parties knew this. By the flexible provisions of thei gas sales contract, the parties have only agreed that a filing may be made with the Commission under given conditions which they believe will justify the change in rate. It is the practical answer of the parties to make the regulatory scheme work. Yet the Commission seeks to reject such agreement without a hearing, regardless of the fact situation involved.

4. Perhaps the real reason for Order No. 242 is given

> "Filings under indefinite escalation clauses have cre ated a significant portion of the administrative burden under which the Commission is laboring today. * * * th complexity of indefinite price clauses requires it t spend an undue amount of time in their determinatio and application * * *. * * * we also serve the need * * of making the tasks of regulation more manageable." (Appendix p. 15a).

That the Commission and its staff have been overloaded by the addition of the regulation of producers to thei prior burdens of regulating pipe lines and electric util ities is well recognized. Largely for its own convenienc and to reduce its workload from five to twenty-five year in the indefinite future, the Commission is trying to pr scribe flexible pricing provisions for producers regardles of economic conditions or requirements of the partie Mere administrative convenience or inconvenience is n

basis for denying either the contract rights guaranteed by the Constitution and provided by the statute or for denying the right to a hearing similarly guaranteed and provided. *Mississippi River Fuel Corp.* v. *FPC*, *supra*, p. 902-903:

> "We can understand, as the argument in this case has seemed to imply, that the Commission may have had to contemplate serious injury to the public interest because of its inability with very limited funds and staff to perform the enormous task of investigation and analysis imposed upon it in times when so many public utilities are submitting important proposals within its jurisdiction and the statutory scheme requires it to act promptly or let proposals go by default. But the remedy lies with Congress. If changes in the law are needed, or more personnel to administer existing law, or both, it is not for the administrative agency or the courts to try to make up for this deficiency by taking unauthorized short cuts or indulging time saving procedures which fail to accord parties the rights which the law as written gives them. Viewed in most favorable light, that seems to us to be what the Commission has tried to do here. It follows that the order of May 29 must be set aside as wholly beyond the authority of the Commission."

An investigation of the situation might well reveal that the overload and delays experienced by the Commission are due not so much to filings by producers under indefinite pricing clauses or even to the number of filings, but rather to the failure of the Commission to decide upon the nature and quantum of evidence which will be sufficient to justify a producer's filing. "Uncertainty of the law foments litigation." If the producers knew with any degree of certainty just what would be necessary and sufficient to discharge their burdens regarding the justness and reason-

ableness of their rates and the public convenience an necessity of their certificates, their filings might well b greatly reduced in number, and their hearings would o a certainty be greatly curtailed in length. The battle o the windmills would be at an end. There is no basis fo depriving producers of the right to file, simply to reduc the workload of the Commission.

Thus, every reason given as the basis for the issue o Order No. 242 is arbitrary and capricious.

D. Order No. 242 discriminates against Superior as an independent producer.

Those natural gas companies which are pipelines an which constitute a large portion of the industry are pe mitted to file rate changes at will in the absence of co tract restriction. This was the significance of *Memphi* (358 U.S. 103, 79 S. Ct. 194) which distinguished *Mobil* (350 U.S. 332, 76 S. Ct. 373) by saying,

> "*Mobile* expressly notes that in the absence of a contractual relationship rates determined ex parte b the seller may be filed under Section 4(d). 350 U.S at 343. We perceive no tenable basis of distinctio between the filing of such a rate in the absence contract and a similar filing under an agreement whic explicitly permits it." (pp. 112-113)

This principle was followed and further distinguish in *Pacific Natural Gas Company* v. *FPC*, (9 Cir. 196 276 F. 2d 350, when the Court said (352):

> "* * * where the service agreement does not prescri a fixed rate to be charged, as was true in the Mempl case, the buyer may properly promise, as it did he to pay for the natural gas at whatever rate is on f with the Commission, the schedule including whi may, of course, be filed unilaterally by the vendor."

This case was an appeal from the denial of a motion to reject the filing of new rates under such a service agreement.

To permit natural gas companies which are pipeline companies to operate almost entirely on indefinite price provisions, and to deny to natural gas companies which are independent producers the right to use any indefinite pricing clause except one providing for a limited renegotiation privilege at fixed five-year intervals is gross discrimination. As the Court said in *Sunray Mid-Continent Oil Company* v. *FPC,* 364 U.S. 137, 143, 80 S. Ct. 1392, (1936):

> "The identical provisions of the Natural Gas Act regulate pipeline companies as well as independent producers."

The same Court, at p. 155, also expressly stated that after the conclusion of the fixed term of a producer contract, the producer can file rate changes at will. There is no basis to discriminate between producer sales as to which the fixed term contract has terminated and new producer sales.

There is nothing in the Natural Gas Act which prohibits flexible pricing provisions, and there is nothing in the Natural Gas Act on which such a prohibition can be based.

The favored nation provision in Superior's contract only gives contractual consent to the filing of a new price by Superior and is much less favorable to Superior than the normal provision in a pipeline tariff (see that quoted in the *Pacific Natural* Case, cited above), because the contractual consent in Superior's contract is limited to the situation where the buyer is paying a higher price within the limited area. The renegotiation provision in Superior's rejected contract is less favorable than the contractual consent con-

tained in the average pipeline contract because the parties only agree to attempt to reach an agreement as to the proper price at the designated future times based on "all pertinent factors". In Order No. 232-A (Appendix, p. 17a) the Commission itself recognizes the value of renegotiation provisions in that the sole purpose of this amendment was to include a limited renegotiation privilege. Thus the Commission's Order No. 242 is invalid as arbitrary, capricious, unreasonable and discriminatory in that it is an attempt to exert rigid control over future negotiations of sellers and buyers, in that each reason stated by the Commission as a basis for such Order is frivolous and capricious, in that the Order discriminates against Superior as an independent producer and, in that Superior has been denied the opportunity to test the validity of the Order.

CONCLUSION

Wherefore, premises considered, Superior prays that this matter be reversed and remanded to the Commission with directions to accept the rejected filings of Superior and set the matter for further proceedings on the issues presented by such filings in accordance with the Court's Opinion which holds Order No. 242 invalid; or in the alternative that this matter be remanded to the Commission with directions that it be set for further hearing with the validity of Order No. 242 as an issue for determination as well as the issues presented by such rejected filings.

Respectfully submitted,

.....

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I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney

APPENDIX A

The pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821; as amended by Act of February 7, 1942, c. 49, 56 Stat. 83; 15 U.S.C. 717-717w, are as follows:

1. **Section 4:**

Rates and Charges; Schedules; Suspension of New Rates

Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such

rates and charges, together with all contracts which i
any manner affect or regulate such rates, charges, class
fications, and services.

(d) Unless the Commission otherwise orders, no chang
shall be made by any natural-gas company in any suc
rate, charge, classification, or service, or in any rule, regu
lations, or contract relating thereto, except after thirt
days' notice to the Commission and to the public. Suc
notice shall be given by filing with the Commission an
keeping open for public inspection new schedules statin
plainly the change or changes to be made in the schedul
or schedules then in force and the time when the chang
or changes will go into effect. The Commission, for goo
cause shown, may allow changes to take effect witho
requiring the thirty days' notice herein provided for b
an order specifying the changes so to be made and th
time when they shall take effect and the manner in whic
they shall be filed and published.

(e) Whenever any such new schedule is filed the Com
mission shall have authority, either upon complaint of an
State, municipality, or State commission, or upon its ow
initiative without complaint, at once, and if it so order
without answer or formal pleading by the natural-ga
company, but upon reasonable notice, to enter upon a hea
ing concerning the lawfulness of such rate, charge, class
fication, or service; and, pending such hearing and th
decision thereon, the Commission, upon filing with suc
schedules and delivering to the natural-gas company a
fected thereby a statement in writing of its reasons fo
such suspension, may suspend the operation of such sche
ule and defer the use of such rate, charge, classificatio
or service, but not for a longer period than five mont
beyond the time when it would otherwise go into effec
Provided, That the Commission shall not have authori

to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. § 717c]

Section 5:

Fixing Rate and Charges; Determination of Cost of Production or Transportation

Sec. 5. (a) Whenever the Commission, after a hearing held upon its own motion or upon complaint of any State,

municipality, State commission or gas distributing com pany, shall find that any rate, charge, or classificatio demanded, observed, charged, or collected by any natural gas company in connection with any transportation or sal of natural gas, subject to the jurisdiction of the Commis sion, or that any rule, regulation, practice, or contrac affecting such rate, charge, or classification is unjus unreasonable, unduly discriminatory, or preferential, th Commission shall determine the just and reasonable rat charge, classification, rule, regulation, practice, or contrac to be thereafter observed and in force, and shall fix th same by order: *Provided, however,* That the Commissio shall have no power to order any increase in any rat contained in the currently effective schedule of such na ural-gas company on file with the Commission, unless suc increase is in accordance with a new schedule filed by suc natural-gas company; but the Commission may order a d crease where existing rates are unjust, unduly discrimina tory, preferential, otherwise unlawful, or are not the lo est reasonable rates.

3. Section 7:

Extension of Facilities; Abandonment of Service

Sec. 7. (a) Whenever the Commission, after notice a opportunity for hearing, finds such action necessary desirable in the public interest, it may by order direct natural-gas company to extend or improve its transport tion facilities, to establish physical connection of its tra portation facilities with the facilities of, and sell natu gas to, any person or municipality engaged or legally a thorized to engage in the local distribution of natural artificial gas to the public, and for such purpose to exte its transportation facilities to communities immediate adjacent to such facilities or to territory served by su

natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f (a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f (b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which

application is made and has so operated since that time the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (d)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall

be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization. [56 Stat. 84 (1942); 15 U.S.C. § 717f (f)]

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company. [56 Stat. 84 (1942); 15 U.S.C. § 717f (g)]

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compen-

sation to be paid for, the necessary right-of-way to con
struct, operate, and maintain a pipe line or pipe lines fo
the transportation of natural gas, and the necessary lan
or other property, in addition to right-of-way, for th
location of compressor stations, pressure apparatus, o
other stations or equipment necessary to the proper oper
ation of such pipe line or pipe lines, it may acquire th
same by the exercise of the right of eminent domain i
the district court of the United States for the district i
which such property may be located, or in the State courts
The practice and procedure in any action or proceedin
for that purpose in the district court of the United State
shall conform as nearly as may be with the practice an
procedure in similar action or proceeding in the court
of the State where the property is situated: *Provided*
That the United States district courts shall only hav
jurisdiction of cases when the amount claimed by th
owner of the property to be condemned exceeds $3,000
[61 Stat. 459 (1947); 15 U.S.C. § 717f (h)]

4. Section 16:

Administration Powers of Commission; Rules, Regula
tions, and Orders

Sec. 16. The Commission shall have power to perfor
any and all acts and to prescribe, issue, make, amend
and rescind such orders, rules, and regulations as it ma
find necessary or appropriate to carry out the provision
of this act. Among other things, such rules and regula
tions may define accounting, technical, and trade term
used in this act; and may prescribe the form or form
of all statements, declarations, applications, and repor
to be filed with the Commission, the information whic
they shall contain, and the time within which they sha
be filed. Unless a different date is specified therein, rul

and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. 717o]

. **Section 19:**

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of

appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court

affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347). (52 stat. 831 (1938); 15 U.S.C. § 717r).

* * *

APPENDIX B

ORDER NO. 242
AMENDING REGULATIONS UNDER
THE NATURAL GAS ACT
(18 CFR 154.93, 157.14, 157.25)

(Issued February 8, 1962)

In this proceeding the Commission has under consideration the amendment of §§ 154.93, 157.14(a)(10) Exhibit H (v), and 157.25, Subchapter E, Regulations Under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations.

By Order No. 232A, issued March 31, 1961 (26 F.R. 2850, 25 FPC 609), the Commission amended section 154.93 of its Regulations so as to provide that indefinite price escalation clauses in sales contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, would be inoperative and of no effect at law. The amendments herein adopted provide for (1) the rejection of contracts containing such indefinite escalation clauses, (2) the rejection of applications by producers for certificates of public convenience and necessity relying for a gas supply upon contracts containing such indefinite escalation provisions, and (3) the Commission's refusal to consider such contracts submitted in support of certificate applications by pipeline companies.

Public notice of proposed rulemaking was given by publication in the Federal Register on October 10, 1961 (26 F.R. 9732), and by mailing copies thereof to interested persons, including natural gas companies, and to State and Federal agencies. In response to such notice, numerous comments were submitted. These comments have been carefully considered but, for the reasons set forth below, we

adhere to the substance of the amendments as originally proposed.

A number of parties contend that the promulgation of these regulations would be unlawful and beyond the powers granted to the Commission by the Natural Gas Act. We conclude, however, that sections 4, 5, and 7 of the Natural Gas Act contemplate that the Commission will refuse to approve contractual provisions found adverse to the public interest. Section 16 of the Act, of course, authorizes the Commission to issue rules and regulations of general applicability found necessary or appropriate to carry out the provisions of the Act.

Protection of the public interest is the touchstone of our regulatory powers under the Natural Gas Act. The Commission's obligation under the Act to the natural gas companies, as one segment of the public whose interest is to be protected, does not compel it to acquiesce in the use of contracts which carry provisions incompatible with a scheme of effective rate regulation. To be sure, the proposed rule will have impact upon contractual practices which have been fairly widespread. But the real issue is not one of "freedom of contract"; the question is whether the rule is rationally related to a condition which requires correction if regulatory objectives embraced by the statute are to be achieved. See *American Trucking Associations* v. *United States*, 344 U.S. 298. In our view, the rule we adopt fully meets this test.

We held in the *Pure Oil* case[1] that indefinite escalation clauses are contrary to the public interest and restated this conclusion in Order No. 232A. Increases in producer prices triggered by indefinite escalation clauses, have resulted in a flood of almost simultaneous filings. These filings bear no apparent relationship to the economic requirements of the producers who file them. The Natural Gas Act con-

[1] *The Pure Oil Company*, 25 FPC 383.

templates that prices, to be just and reasonable, be related to economic needs. The elimination of indefinite escalation provisions does not, of course, cut off other avenues by which a producer may make provision for filing for increased rates.

Filings under indefinite escalation clauses have created a significant portion of the administrative burdens under which this Commission is laboring today. The Natural Gas Act contemplates that rate increases shall be sought when there is economic justification, but not that there shall be a chain reaction in a wide area whenever one producer in the area negotiates a contract at a new price level. The Act requires the Commission to give precedence to the hearing and decision of rate increases, but the complexity of indefinite price clauses requires it to spend an undue amount of time in their interpretation and application at the expense of making a prompt determination of the rate issues involved. Accordingly, in protecting the public against waves of increases which have no defensible basis, we also serve the need — which we believe we should take into account — of making the tasks of regulation more manageable.

It has been brought to our attention that section 154.93 of the Regulations, as amended by Order No. 232A, refers to the date of execution of a contract, rather than the filing date (to which we referred in the notice of this proceeding). It is suggested that this point should be clarified. The Commission agrees and has made appropriate changes. In order to conform the language of the amendments to our existing regulations, we have also changed the phrase "price-escalation provisions" to "price-changing provisions".

The Commission, acting pursuant to authority granted by the Natural Gas Act, particularly sections 4, 5, 7, and 16 thereof (15 U.S.C. 717c, 717d, 717f, and 717o), *orders* that Parts 154 and 157, Subchapter E, Chapter I, of Title 18

of the Code of Federal Regulations be amended as follows:

(A) § 154.93 *Rate Schedule Defined,* is amended by adding a provision at the end thereof to read:

Provided further, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.

(B) § 157.14(a)(10) *Exhibit H — Total Gas Supply Data* (v), is amended by adding a proviso at the end thereof to read:

Provided, further, however, That any contract executed on and after April 2, 1962, and filed in support of an applicant's gas supply showing will be given no consideration in determining adequacy of gas supply if it contains any price-changing provisions other than those defined as permissible in § 154.93 hereof.

(C) § 157.25 *Necessary exhibits, Exhibit B, Contracts,* is amended by deleting all the language after the first sentence thereof, ending with the words "Natural Gas Act", and inserting in lieu thereof the following:

On or after April 2, 1962, the application shall be rejected if any contract submitted in support thereof contains any price-changing provisions other than those defined as permissible in § 154.93 hereof.

(D) These amendments shall become effective on April 2, 1962.

(E) The Secretary of the Commission shall cause prompt publication of this order to be made in the Federal Register.

By the Commission. Commissioner O'Connor not participating.

JOSEPH H. GUTRIDE,
Secretary.

APPENDIX C

(18 CFR 154.93)

ORDER NO. 232A

ORDER MODIFYING ORDER AMENDING THE COMMISSION'S GENERAL RULES AND REGULATIONS

(Issued March 31, 1961)

On March 3, 1961, the Commission issued its Order No. 32 in this proceeding amending Sections 154.91 (a) and 54.93 of the Regulations under the Natural Gas Act (18 FR 154.91 (a) and 154.93). The order provided that indefinite escalation clauses, contained in producer contracts led on and after April 3, 1961, for the jurisdictional sale r transportation of gas, shall be inoperative and of no ffect at law. Since March 3, interested persons have subitted views and comments concerning the amendments to ur regulations. Upon consideration of such comments and pon our own further consideration, we find it necessary nd appropriate to modify the amendments promulgated by rder No. 232.

We reaffirm our earlier findings that the use of long-term ntracts for the sale of natural gas by producers to pipeies or to others is desirable and appropriate in the public terest but that indefinite escalation provisions are, in neral, contrary to the public interest. However, it also ppears that elimination of all indefinite escalation provisons would be too restrictive to enable the industry adeuately to cope with possible changing economic conditions er the span of long-term contracts. Therefore, to permit icing flexibility and to provide an incentive for long-term ntracts, we should permit future contracts to contain mited price-redetermination provisions, invocable not more an once in every five-year contract period and based upon

rates subject to this Commission's jurisdiction (and there-
fore, controlled).

Also upon reconsideration, it appears that the amend-
ments by their terms apply to any contract filed with the
Commission on or after April 3, 1961, even if the contract
was executed prior to April 3. The amendments should be
changed to apply only to contracts executed on or after
April 3, 1961.

We hereby *modify* our Order No. 232, issued March 3,
1961, in this proceeding, in the following manner *and order*:

(A) Paragraphs (2) and (3) of the Commission's finding
are changed to read as follows:

(2) Gas supply contracts containing provisions for rate
changes dependent or based in whole or part on in-
definite escalation clauses such as favored-nation, un-
limited redetermination or renegotiation, spiral esca-
lation, inflationary adjustment, price indices and
revenue-sharing clauses have contributed to insta-
bility and uncertainty concerning prices of gas and
service expansion by natural gas companies. As
found by us in the proceeding of *The Pure Oil Com-
pany,* Docket No. G-17930, Opinion No. 341, these
indefinite escalation provisions are in general con-
trary to the public interest. Such escalation provi-
sions, therefore, are generally undesirable, unneces-
sary and incompatible with the public interest for the
due and proper development of natural gas service by
natural gas companies. However, limited price-re-
determination provisions appear appropriate to me-
the difficulty of pricing for long and unpredictable
periods and to encourage the negotiation of long term
contracts. Limited price-redetermination provisions,
as hereinafter ordered, appear to be in the public

interest and should be permitted in producer contracts for the sale or transportation of natural gas subject to our jurisdiction.

(3) It is necessary and appropriate in the public interest and in the proper administration of the Natural Gas Act that § 154.93 of the Regulations under the Natural Gas Act (18 CFR 154.93) be amended to specify the change of price provisions that may be contained in future producer rate schedules submitted for filing with this Commission.

(B) Paragraph (A) of the Commission's Order No. 232 changed to read as follows:

(A) Part 154, entitled Rate Schedules and Tariffs, Subchapter E — Regulations under the Natural Gas Act, Chapter I of title 18, Code of Federal Regulations, is amended by adding a proviso at the end of § 154.93, *Rate schedule defined,* to read as follows:

"*Provided,* That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(2) provisions that change a price to a specific amount at a definite date; and

(3) provisions that, once in five-year contract periods during which there is no provision for a change

in price to a specific amount [paragraph (2)] change a price at a definite date by a price-re determination based upon and not higher tha a producer rate or producer rates which are sub ject to the jurisdiction of the Commission, ar not in issue in suspension or certificate proceed ings, and are in the area of the price in question

(C) This amendment shall become effective April 3, 1961

(D) The Secretary of the Commission shall cause publi cation of this order to be made in the Federal Registe By the Commission. Commissioner Kline would furthe modify the order to permit renegotiation clauses in co formity with the views expressed in his statement accon panying Order No. 232 issued March 3, 1961.

Joseph H. Gutride,
Secretary.